

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Kellogg Brown & Root Services, Inc.) ASBCA No. 56358
)
Under Contract No. DAAA09-02-D-0007)

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Army Chief Trial Attorney
LTC Eugene Y. Kim, JA
Robert T. Wu, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON APPELLANT'S MOTION FOR JUDGMENT
ON THE PLEADINGS AND THE GOVERNMENT'S
CROSS-MOTION FOR SUMMARY JUDGMENT

Kellogg Brown & Root Services, Inc. (KBRS) appeals the deemed denial of its claim for \$19,652,815 withheld by the government from payments invoiced by KBRS under the captioned cost reimbursement contract (hereinafter "Contract 0007"). KBRS moves for judgment on the pleadings. The government opposes and cross-moves for summary judgment. Since we consider matters other than the pleadings on their face, we treat both motions as for summary judgment. *Sentara Health System*, ASBCA No. 51540, 99-1 BCA ¶ 30,323 at 149,956. Finding genuine issues of material fact, we deny both motions.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

A. Contract Award and Provisions at Issue

1. On 14 December 2001, the Army Sustainment Center (ASC) awarded Contract 0007 to KBRS. The contract was a cost plus award fee, indefinite delivery, indefinite quantity contract with a base period of one year and nine one-year option periods. The contract implemented the Logistics Civil Augmentation Program (LOGCAP) whereby civilian contractors "provide the Army with an additional means to adequately support

the current and programmed force by performing selected services in wartime and other operations.” (R4, tab 1 at 1, 56)

2. Contract 0007 included, among other provisions, the FAR 52.216-7, ALLOWABLE COST AND PAYMENT (MAR 2000) clause (hereinafter “the Allowable Cost clause”), and the following special provisions:

H-13 Management

The contractor shall ensure that all personnel hired by or for the contractor will comply with all guidance, instructions, and general orders applicable to the U.S. Armed Forces and DoD civilians as issued by the Theater Commander or his/her representative. This will include any and all guidance and instructions issued based upon the need to ensure mission accomplishment, force protection, and safety, unless directed otherwise in the task order SOW.

The contracting officer is the only authorized official who shall increase, decrease, or alter the scope of work to be performed, and any orders or instructions interpreted by the contractor as impacting the scope or cost of the contract.

The contractor shall comply, and ensure that all deployed employees, subcontractors, subcontractors employees, invitees and agents comply with pertinent Service and Department of Defense directives, policies, and procedures, as well as federal statutes, judicial interpretations and international agreements (e.g., Status of Forces Agreements, Host Nation Support Agreements, etc.) applicable to U.S. Armed Forces or U.S. citizens in the area of operations....

The contractor shall at all times be responsible for the conduct of its employees and those of its subcontractors and invitees.

....

H-16 Force Protection

While performing duties [in accordance with] the terms and conditions of the contract, the Service Theater Commander will provide force protection to contractor employees

commensurate with that given to Service/Agency (e.g., Army, Navy, Air Force, Marine, DLA) civilians in the operations area unless otherwise stated in each task order.

H-21 Weapons and Training

Whether contractor personnel will be permitted to carry a government issued weapon for self-defense purposes in the Area of Operations (AO) is at the discretion of the Theater Commander. However, Contractor personnel will not possess personally owned firearms in the AO. The government may at its discretion issue weapons and ammunition (M9 Pistols) for self-defense to the contractor employees....If accepted the contractor will maintain a listing of employees possessing a government firearm and provide notification to the Contracting Officer....Also when accepted, only military issued ammunition may be used in the weapon.

Prior to issuing any weapons to contractor employees, the government at its discretion may provide the contractor employees with weapons familiarization training commensurate to training provided to Department of Defense civilian employees.

The contractor shall ensure that its employees adhere to all guidance and orders issued by the Theater Commander or his/her representative regarding possession, use, safety, and accountability of weapons and ammunition.

Upon redeployment, or notification by the government, the contractor shall ensure that all government issued weapons and ammunition are returned to government control.

Contractors will screen employees, and subcontractors, to ensure that employees may be issued a weapon in accordance with U.S. or applicable host nation laws. Evidence of screening will be presented to the contracting officer.

(R4, tab 1 at 37, 96, 98, 101-02)

3. For purposes of this appeal, the "Theater" referred to in the first paragraph of Special Provision H-13 was the United States Central Command (hereinafter

“USCENTCOM”). When Contract 0007 was awarded, USCENTCOM General Order Number 1A dated 19 December 2000 stated in relevant part:

TITLE: Prohibited Activities for U.S. Department of Defense Personnel Present Within the United States Central Command (USCENTCOM) AOR.

PURPOSE: To identify conduct that is prejudicial to the maintenance of good order and discipline of all forces in the USCENTCOM AOR.

AUTHORITY: Title 10, United States Code, Section 164(c) and the Uniform Code of Military Justice (UCMJ), Title 10, United States Code, Sections 801-940.

APPLICABILITY: This General Order is applicable to all United States military personnel, and to civilians serving with, employed by, or accompanying the Armed Forces of the United States, while present in the USCENTCOM AOR....

1. STATEMENT OF MILITARY PURPOSE AND NECESSITY: Current operations and deployments place United States Armed Forces into USCENTCOM AOR countries where local laws and customs prohibit or restrict certain activities which are generally permissible in western societies. Restrictions upon these activities are essential to preserving U.S./host nation relations and combined operations of U.S. and friendly forces. In addition, the high operational tempo combined with often-hazardous duty faced by U.S. forces in the region makes it prudent to restrict certain activities in order to maintain good order and discipline and ensure optimum readiness.

2. PROHIBITED ACTIVITIES:

a. Purchase, possession, use or sale of privately owned firearms, ammunition, explosives, or the introduction of these items into the USCENTCOM AOR.

b. Entrance into a Mosque or other site of Islamic religious significance by non-Moslems....

c. Introduction, possession, sale, transfer, manufacture or consumption of any alcoholic beverage within the countries of Kuwait and Saudi Arabia....

d. Introduction, purchase, possession, use, sale, transfer, manufacture, or consumption of any controlled substances, or drug paraphernalia....

e. Introduction, possession, transfer, sale, creation, or display of any pornographic or sexually explicit photograph, video tapes, movie, drawing, book, magazine, or similar representations....

f. Gambling of any kind, including sports pools, lotteries and raffles, unless permitted by host-nation laws and applicable service or component regulations.

g. Removing, possessing, selling, defacing or destroying archeological artifacts or national treasures.

h. Selling, bartering or exchanging any currency other than at the official host-nation exchange rate.

i. Adopting as pets or mascots, caring for, or feeding any type of domestic or wild animal.

j. Proselytizing of any religion, faith or practice.

k. Taking or retaining individual souvenirs or trophies....

(Bd. ex. 3)

B. Deployment in Kuwait and Iraq

4. In March 2003, the United States and its coalition partners invaded and occupied the Republic of Iraq. In support of this operation, ASC on 4 January, 13 June and 8 July 2003 issued to KBRS notices to proceed with Task Orders (TOs) 36, 59 and 69 under Contact 0007. As modified, these TOs required, among other things, the operation of military dining facilities (DFACs) at 11 locations in Iraq and one location in Kuwait. (R4, tab 2 at 2, tab 3 at 2, tab 4 at 2; compl. and answer ¶¶ 12-14) From the inception of the task orders, these DFACs were operated by ESS World Wide Support Services (ESS) initially as a sub-subcontractor and from April 2004 as a subcontractor of KBRS.

5. From 8 May 2003 through 28 June 2004, Iraq was governed on a temporary basis by the Coalition Provisional Authority (CPA). The CPA was an “international entity” created by the coalition partners that had participated in the military occupation of Iraq. See *MAC International FZE*, ASBCA No. 56355, 10-2 BCA ¶ 34,591 at 170,507, 170,516, *appeal docketed*, No. 11-1233 (Fed. Cir. March 1, 2011). On 23 May 2003, the CPA issued Order Number 3. That order authorized Coalition Forces “to carry small arms openly in public places,” and expressly included “contractors” in its definition of Coalition Forces. (Bd. ex. 1)

6. At a meeting with the government on 9 July 2003 to discuss convoy force protection, a KBRS representative reported that from mid-May 2003 to date total casualties including those of its subcontractors were seven killed, seven wounded and four missing from attacks on its convoys. The senior government official at this meeting stated that on the following day the government could provide force protection for only 46 percent of the convoys waiting to travel north and that the government was short convoy escort vehicles and shotgun riders. (R4, tab 56 at 21)

7. On 24 November 2003, an intra-government e-mail stated that “the Army has entered into a contract with KBR and is apparently unable to provide the requisite security and protection....If uncorrected this will significantly impact the fuel, line haul, mail and Class I [food] transportation mission areas supported under this contract.” (*Id.* at 48-49)

8. By letter dated 12 December 2003, ESS requested KBRS to grant an exception to a KBRS policy that movements of subcontractor personnel within Iraq be in a military convoy. The ESS request stated:

ESS received your Supplemental Agreement, dated 19 August 2003, and would like to request an exception to this policy. ESS would like to [have] authority to move within Iraq using our private security for the purpose of the movement of our management and operations personnel.

This is of utmost importan[ce] to our movements between Baghdad and Tikrit as well as the sites within the Tikrit area. We view this as critical to our success. Presently it is quite difficult if not impossible to obtain escorted transport between these locations. We fear that if required to adhere to the current policy, we will not be as effective and our service may not be as expected. We have been in situations whereby escorts were delayed for great lengths of time or outright

canceled, resulting in loss of time, resources and diminished effectiveness.

We understand the risk involved and assume all responsibility for these movements. Our movements will be limited to personnel. Our security is provided by Control Risk Group CRG London UK. CRG is a professional security organization, well suited for the present environment. We have been using CRG for some time and are quite satisfied with their ability to safeguard our personnel. Prior to LOGCAP activities we used CRG extensively in Iraq in the daily conduct of our business.

(Gov't opp'n, ex. 6 at 6)

9. On 31 December 2003, the CPA issued its Order Number 3 (Revised) (Amended). This order expressly included "contractors" in the definition of Coalition Forces and authorized Coalition Forces to "possess and use issued Firearms and Military Weapons." The order also included the following provision:

- 2) Private security firms may be licensed by the Ministry of the Interior to possess and use licensed Firearms and Military Weapons, excluding Special Category Weapons, in the course of their duties, including in public places.

(Bd. ex. 2)

10. There is no evidence in the present record of any direct response to the ESS request of 12 December 2003. However when KBRS in January 2004 notified the government that the government's failure to provide requested military escorts for subcontractor movements was adversely affecting subcontractor performance, the answer given was "these combat units were sent here to fight the war, not do escorts for KBR ONLY....As soon [as military unit] is ready to resume the escort duty I will let you and Jim know." (Gov't opp'n, ex. 7)

C. The Subcontracts Awarded to ESS in April 2004

11. Between 22 and 31 March 2004, KBRS solicited from ESS proposals for 11 new sole source subcontracts to operate the DFACs (supp. R4, tab 2 at 405, 1435, 3804, 6290). Between 10 and 13 April 2004, KBRS awarded the 11 subcontracts to ESS (supp. R4, tab 2 at 700-01, 1677-78, 2380-81, 3084-85, 4031-32, 4632-33, 5163-64, 5793-94, 6456-57, 6948-49, 7650-51). The KBRS justifications for the sole source

awards stated: "Selection of ESS was based on ESS owning and operating the DFAC at site, ability to offer immediate service, and the continuity of services gained" (supp. R4, tab 2 at 607, 1574, 2289, 2991, 3949, 4576, 5062, 5631, 6439, 6824, 7617).

12. The price structure in all 11 of these ESS subcontracts consisted of firm-fixed unit prices for specified elements and quantities of the work (supp. R4, tab 2 at 703-06, 1680-83, 2383-86, 3088-90, 4034-36, 4635-37, 5166-68, 5798-5800, 6459-61, 6951-53, 7652-56). The firm-fixed prices included an amount for "security." In a letter to KBR dated 9 March 2005, ESS described the security component in the "labor pricing in our subcontracts," as follows:

ESS currently spends a significant amount of money annually on security, as you can see it is 12.55% of our Labor category and our 2nd highest cost factor. These costs have increased considerably over the past year with the heightened threat, Iraqi elections and overall increase of terrorism in Iraq.

The security is used to escort our operations director and senior management personnel through out Iraq to work and conduct business on our LOGCAP sites. Our security is basically comprised of three components. They are:

- Expatriate Movements. We move quite regularly expats in and off site, as well as our senior management movements throughout Iraq.
- TCN Movements. We move our labor force in and off site on rotations and periodic medical requirements.
- Equipment/Supplies. We regularly move equipment and supplies throughout Iraq.

(R4, tab 28 at 1-2)

13. The scope of the private security used by ESS, and the resulting benefit to the government, is described in a 23 March 2005 memorandum of the KBR DFAC subcontract administrator as follows:

The utilization of at a minimum four private security teams (each with nine western security personnel per team) per day in the theater enable senior management and operations personnel to conduct DFAC business fairly efficiently in a hostile environment.

The security details control not only expatriate movements, but TCN movements for medical and or rotational needs, and the movement of basic DFAC equipment and supplies. As other vendors have experienced undue delays, with exclusive reliance on sporadic military escort movements, ESS has maintained the ability to move personnel and goods to the sites to the benefit of both KBR and the client.

(R4, tab 29 at 4)

14. On 26 June 2004, the CPA issued its Memorandum Number 17 establishing registration requirements for private security companies (PSCs) operating in Iraq. This memorandum noted that "a number of PSC and their employees are already operating in Iraq without the benefit of appropriate registration and authorization of the Ministry of Interior and Trade." It then provided detailed procedures for registration, vetting and licensing PSCs. (Bd. ex. 4)

15. In a memorandum dated 6 February 2007, a government price analyst calculated that the KBRS billings to the government for the firm-fixed prices in the ESS subcontracts included \$18,551,279 for security. This calculation was expressly based on the statement in the ESS letter of 9 March 2005, that 12.55% of the labor component of its subcontract pricing was for security. With mark-ups for KBRS overhead, G&A, base fee and award fee, the analyst concluded that the total billing to the government for ESS security was \$19,652,815. (R4, tab 54)

16. Also on 6 February 2007, the Defense Contract Audit Agency issued to KBRS a DCAA Form 1 Notice of Contract Costs Suspended and Disapproved, "suspending \$19,652,815 related to ESS subcontract costs under [Contract 0007]." The basis for the suspension was stated on page 2 of the DCAA Form 1 in relevant part as follows:

The Government has recently been made aware that KBRSI has submitted invoices which include substantial costs associated with providing security to subcontractor employees during performance of dining facility services under [Contract 0007]. As noted within the basic contract (clause H-16), and as noted in several task orders, security was to be provided by the Government to those employees performing duties under [Contract 0007]. As such, costs associated with privately acquired security should not be charged or paid under the contract in accordance with Federal Acquisition Regulation (FAR) 52.216-7, Allowable Cost and

Payment and FAR Part 31, Contract Cost Principles and Procedures.

(R4, tab 60)

17. By letter dated 22 October 2007, KBRS submitted a certified claim to the contracting officer for breach of contract for non-payment of the suspended costs (R4, tab 59). Although the certified claim requested a contracting officer's decision, no decision was issued. On 24 March 2008, KBRS appealed the deemed denial.

DECISION

KBRS moves for judgment on the pleadings on the grounds that (i) the contract obligated the government to pay KBRS all of its allowable costs, (ii) the contract did not prohibit use of private armed security by its subcontractor ESS, and (iii) the contract did not prohibit KBRS from recovering such costs incurred by its subcontractors (app. mot. at i). The government opposes the motion and cross-moves for summary judgment on the grounds that "through the plain language of the contract read as a whole, and the understanding of the parties, it is clear that Appellant and its subcontractors were prohibited from using private armed security and are not allowed to recover the costs of that private armed security" (gov't opp'n at 3).

As a preliminary matter, KBRS contends that the government has no contractual right to disallow a particular component of a subcontract fixed price but can consider only the allowability of the subcontract total fixed price as a whole. However, none of the authorities cited for this proposition involved the allowability of a questioned component of a subcontract fixed price as a reimbursable cost under a cost reimbursement prime contract. (App. reply at 4-9) In the context of determining the reasonableness of a subcontract fixed price under a cost reimbursement prime contract, the government may properly consider the components of that subcontract fixed price. *Grumman Aerospace Corp. v. United States*, 549 F.2d 767, 774-75 (Ct. Cl. 1977).

Under the Allowable Cost clause of the prime contract and FAR Subpart 31.2 referenced therein, the factors to be considered in determining whether a cost is allowable are (i) reasonableness, defined as a cost that "in its nature and amount...does not exceed that which would be incurred by a prudent person in the conduct of competitive business;" (ii) allocability; (iii) standards promulgated by the Cost Accounting Standards (CAS) Board if applicable, otherwise, generally accepted accounting principles and practices appropriate to the particular circumstances; (iv) the terms of the contract and (v) any limitations set forth in FAR Subpart 31.2. FAR 31.201-2, 31.201-3. The government in its DCAA Form 1 suspension of costs cited only Special Provision H-16 as the basis for the suspension (SOF ¶ 16). Special Provision H-16 on its face states only that the government will provide force protection to contractor employees commensurate

with that given to Service/Agency civilian employees in the area of operations. It contains no prohibition on the use of private security companies by the contractor or its subcontractors to supplement the force protection provided by the government as needed to accomplish their logistical support mission. (SOF ¶ 2)

In its opposition to the KBRS motion, the government argues that Special Provisions H-13 and H-21 of the contract also prohibit the use of private security companies by the contractor and its subcontractors for force protection (gov't opp'n at 14). We do not agree. Special Provision H-21 prohibits the possession of privately-owned weapons by contractor "personnel" and states that the government may, at its discretion, issue government M9 pistols and ammunition "for self-defense to the contractor employees" and may also provide weapons familiarization training to them (SOF ¶ 2). These provisions address only the individual employee's access to firearms for self-defense. They do not address the use of armed private security companies by the contractor and its subcontractors to supplement the force protection provided by the government.

The first paragraph of Special Provision H-13 required all personnel hired by or for the contractor to comply "with all guidance, instructions, and general orders applicable to the U.S. Armed Forces and DoD civilians issued by the Theater Commander or his/her representative" (SOF ¶ 2). In this category of guidance, instructions, and general orders of the Theater Commander, the government cites only USCENTCOM General Order Number 1A, dated 19 December 2000 as prohibiting contractor use of armed private security companies (gov't opp'n at 8). Again, we disagree. General Order Number 1A is a code of personal conduct. The prohibition of possession of privately-owned firearms is one item in a list of 11 restrictions on individual personal activities including, among others, use of alcohol, recreational drugs, pornography, gambling, vandalism, illegal currency transactions, and proselytizing religion. (SOF ¶ 3) In this context, the prohibition on possession of privately-owned firearms is not addressed to the use of armed private security companies to supplement government-provided force protection where necessary to accomplish the contract logistical support mission.

The third paragraph of Special Provision H-13 required the contractor to comply and ensure compliance by its deployed employees, subcontractors and subcontractor employees with "pertinent Service and Department of Defense directives, policies and procedures, as well as...international agreements (e.g. Status of Forces Agreements, Host Nation Support Agreements, etc.)." The government cites the requirements in CPA Order Number 3 (Revised) (Amended) dated 31 December 2003 and CPA Memorandum Number 17 dated 26 June 2004 for private security companies to be registered with and licensed by the Iraqi Ministry of Interior (MOI) to possess and use firearms, and assumes that in the absence of evidence to the contrary that those companies were not so registered and licensed. (Gov't opp'n at 8) We find no basis for this assumption. There

is no evidence on the compliance issue in the record before us on the motions. Moreover, appellant states that: "virtually no discovery has taken place on this issue, and the issue is material to the Government's contention that KBR could not bill for costs allegedly associated with ESS's use of allegedly unregistered and/or unlicensed PSCs" (app. opp'n at 7-8). Since compliance with the CPA directives appears to be a requirement of the third paragraph of Special Provision H-13 and as such is a factor to be considered in determining the allowability of the costs at issue, *see* FAR 31.201-2(a)(4), we consider compliance to be a genuine issue of material fact.

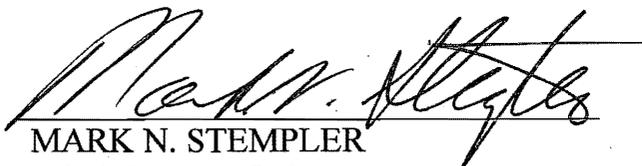
We hold as a matter of law that there was no categorical prohibition in the terms of Contract 0007 on the use of armed private security companies, without the express permission of the Theater Commander, to supplement the government force protection where necessary to accomplish the logistical support mission. However, there remain on this record genuine issues of material fact as to (i) whether the armed private security companies retained by ESS were properly registered and licensed in accordance with CPA Order Number 3 (Revised) (Amended) and CPA Memorandum Number 17, and (ii) whether at the time the 11 subcontracts at issue were awarded, the component for armed private security companies included in the subcontract fixed prices was reasonable as to both the need for and amount of that component. Genuine issues of material fact preclude summary judgment. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

The motions are denied.

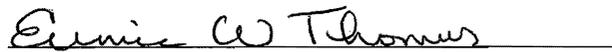
Dated: 2 April 2012


MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur


MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur


EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56358, Appeal of Kellogg Brown & Root Services, Inc., rendered in conformance with the Board's Charter.

Dated: **APR - 2 2012**

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals